

# An Alternative Contractual Approach to Holistic Health Care

## I. INTRODUCTION

Acupuncture, midwifery, therapeutic massage, meditation, and other holistic health practices are attracting increasing attention, both because clients are dissatisfied with aspects of traditional health care<sup>1</sup> and because holistic practices emphasize prevention and wellness, unlike traditional medicine's focus on pathology and disease.<sup>2</sup> Despite this fundamental difference between holistic practice and orthodox medicine, the legal system continues to apply to the holistic field the same regulations and legal theories that developed alongside traditional medical practice. Both holistic and traditional practices are governed by medical practice acts that license and regulate the healing arts on the assumption that regulation is necessary to protect the public from serious harm.<sup>3</sup> Many holistic health practices, however, carry less risk of serious harm than surgery, drug prescription, and other modern medical techniques.<sup>4</sup> Yet all are approached in civil courts under negligence theory, in which the professional community defines the standard of care the practitioner owes to a client. Because an externally determined standard of care places the greatest responsibility for healing on the practitioner, it is inimical to holistic health practice, in which the client shoulders the major burden for improvement.

### A. *What is Holistic Health?*

A holistic approach to health rests on the belief that "medicine is but one perspective from which we may perceive health and disease."<sup>5</sup> Holistic practitioners regard modern medicine as "a science of pathology geared to determine scientifically valid principles for diagnosing and treating illness, injury, and disease."<sup>6</sup> Health is more than the absence of disease, however, and a holistic outlook highlights preventive care, general well-being, and energy.<sup>7</sup>

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1. Cousins, *Introduction* to K. PELLETIER, *HOLISTIC MEDICINE: FROM STRESS TO OPTIMUM HEALTH* at xv (1979).

2. Green, *Responsibility for Health*, 2 J. HOLISTIC HEALTH 76, 78 (1977). Holistic health encompasses five general areas: (1) assessment (e.g., kinesiology, psychic reading, and iridology); (2) rebalancing and improving energy (e.g., chiropractic, acupuncture, and polarity therapy); (3) self-regulation (e.g., biofeedback, yoga, meditation, and visualization); (4) body work (e.g., Alexander Technique, Feldenkrais Movement Method, therapeutic massage, and Rolfing); and (5) natural medicine (e.g., naturopathy, homeopathy, nutrition, and natural childbirth). This list is not exhaustive. For excellent introductions to the field, see *HEALTH FOR THE WHOLE PERSON* (A. Hastings, J. Fadiman & J. Gordon eds. 1980) and *WHOLISTIC DIMENSIONS IN HEALING: A RESOURCE GUIDE* (L. Kaslof ed. 1978).

3. See *infra* notes 88-89 and accompanying text.

4. See, e.g., Gordon, *The Paradigm of Holistic Medicine*, in *HEALTH FOR THE WHOLE PERSON* 9 (A. Hastings, J. Fadiman & J. Gordon eds. 1980).

5. Green, *Responsibility for Health*, 2 J. HOLISTIC HEALTH 76, 76 (1977).

6. Green, *Creating New Roles for Changing Times*, in *WHOLISTIC DIMENSIONS IN HEALING: A RESOURCE GUIDE* 4 (L. Kaslof ed. 1978).

7. Gordon, *supra* note 4, at 17.

Because the client controls lifestyle changes that encourage health and prevent disease, individual responsibility forms the cornerstone of holistic health practice.<sup>8</sup> Clients depend more on themselves to attain health than on professionals and institutions;<sup>9</sup> the practitioner is a resource person to aid the client in determining what areas of health are within his or her control<sup>10</sup> rather than an external force who "provides" health. As an active partner in health maintenance, the client cannot passively accept the judgment of a professional.<sup>11</sup>

Client education is essential if clients are to accept this personal responsibility for health.<sup>12</sup> Holistic practitioners believe that their clients can understand holistic processes and techniques and can make intelligent decisions about their own health. During the last two decades public sophistication about health care has increased, and people have begun to seek practitioners who will explain to them and confer with them, not merely patronize them.<sup>13</sup>

Despite the great variety of holistic health practices, all rest on a belief in the body's "innate capacity for self-healing."<sup>14</sup> Pain and other symptoms indicate more fundamental problems, and rather than eradicate only the symptoms directly the holistic practitioner helps a client strengthen his or her body so that it can restore its own natural balance.<sup>15</sup> Guided imagery can activate the immune system and can be particularly effective in conjunction with cancer treatments.<sup>16</sup> Nutritional counseling can lead to improvements in the body's chemical balance.<sup>17</sup> Biofeedback, yoga, and meditation can reduce, without drugs, the physiological effects of stress.<sup>18</sup> Exercise and massage can replace steroids and aspirin to mobilize limbs stiffened by arthritis.<sup>19</sup> Rolfing, a system of deep massage, reduces muscular stress and increases energy by restoring the natural positions of body masses.<sup>20</sup> Acupuncture also

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8. *Id.* at 18.

9. PUBLIC AFFAIRS RESEARCH GROUP, PUBLIC REGULATION OF HEALTH CARE OCCUPATIONS IN CALIFORNIA. A STUDY CONDUCTED FOR THE CALIFORNIA BOARD OF MEDICAL QUALITY ASSURANCE BY THE PUBLIC AFFAIRS RESEARCH GROUP 30 (1981) [hereinafter cited as PARG STUDY].

10. Green, *Creating New Roles for Changing Times*, in WHOLISTIC DIMENSIONS IN HEALING: A RESOURCE GUIDE 4, 5 (L. Kaslof ed. 1978).

11. *See, e.g.*, Gordon, *supra* note 4, at 3.

12. *See id.* at 18.

13. Cousins, *Introduction* to K. PELLETIER, HOLISTIC MEDICINE: FROM STRESS TO OPTIMUM HEALTH at xvii (1979).

14. Gordon, *supra* note 4, at 18.

15. *Id.*

16. *Id.* at 19. *See also* O. SIMONTON, S. MATTHEWS-SIMONTON & J. CREIGHTON, GETTING WELL AGAIN 129-31 (1978). In guided imagery a patient visualizes or imagines, under a practitioner's guidance, the physiological process that his or her body will use to eradicate the disease from which it suffers. *See generally* O. SIMONTON, S. MATTHEWS-SIMONTON & J. CREIGHTON, GETTING WELL AGAIN (1978).

17. Gordon, *supra* note 4, at 19. *See also* M. GERSON, A CANCER THERAPY 5-9 (1958).

18. Shapiro, *Meditation and Holistic Medicine*, in HEALTH FOR THE WHOLE PERSON 159 (A. Hastings, J. Fadiman & J. Gordon eds. 1980). *See also* H. BENSON, THE RELAXATION RESPONSE (1976).

19. Gordon, *supra* note 4, at 18-19.

20. Rolf, *Structural Integration: A Contribution to the Understanding of Stress*, 5 BULL. STRUCTURAL INTEGRATION 5 (1976).

increases energy; it assuages pain as well.<sup>21</sup> The natural approach of these techniques appeals to those who are alarmed by the widely publicized dangers of some drugs.<sup>22</sup> For example, some chemical compounds may cause birth defects; antibiotics have unpleasant side effects and can become less effective over time; steroid drugs disturb the endocrine system;<sup>23</sup> and diethylstilbestrol can cause vaginal cancer in offspring of mothers who ingested the drug during pregnancy.<sup>24</sup>

Finally, holistic health emphasizes the entire healing process and not merely the end result of the treatment.<sup>25</sup> For example, the effectiveness of therapeutic touch depends on the quality of the relationship between practitioner and client.<sup>26</sup> Traditional medicine's increasing specialization, its dependence on advanced technology, and a concomitant decrease in the personal aspects of the healing relationship have made holistic health care's human warmth and integrated approach more attractive to many people than the medical model.<sup>27</sup>

### B. *Proposal for a New Approach to Holistic Health*

A legal approach that emphasizes the consensual nature of the relationship between a holistic practitioner and a client is more appropriate to holistic care than the current negligence approach to healing relationships, in which tort law automatically defines, under a judicially established standard, the relationship between the parties, their responsibilities, and the reasonableness of the client's expectations. When practitioner and client are concerned with maintaining health and energy rather than with treating disease, when the therapy carries a low potential for harm, and when the nature of the agreement and distribution of responsibilities can be made reasonably clear, a contract can protect the interests of both client and practitioner, encourage the parties to work together toward a common goal, and provide needed flexibility in the developing field of holistic health care.

After reviewing the relevant legal issues as they have emerged in suits against physicians and drugless healers,<sup>28</sup> this Comment will suggest an alter-

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21. Bresler, Kroening & Volen, *Acupuncture in America*, in *WHOLISTIC DIMENSIONS IN HEALING: A RESOURCE GUIDE* 133 (L. Kaslof ed. 1978).

22. Cousins, *Introduction* to K. PELLETIER, *HOLISTIC MEDICINE: FROM STRESS TO OPTIMUM HEALTH* at xv (1979).

23. *Id.*

24. WILLIAMS OBSTETRICS 321 (J. Pritchard & P. MacDonald eds. 16th ed. 1980).

25. P. FLYNN, *HOLISTIC HEALTH: THE ART AND SCIENCE OF CARE* 12 (1980).

26. See, e.g., Krieger, *The Potential Use of Therapeutic Touch in Healing*, in *WHOLISTIC DIMENSIONS IN HEALING: A RESOURCE GUIDE* 182 (L. Kaslof ed. 1978).

27. Cousins, *Introduction* to K. PELLETIER, *HOLISTIC MEDICINE: FROM STRESS TO OPTIMUM HEALTH* at xvi-xvii (1979).

28. Cases concerning health practitioners who are not M.D.s (such as chiropractors, podiatrists, and naturopaths) are classified in the legal literature under the heading "Drugless Healer." See Annot., 19 A.L.R.2d 1188-1224 (1951 & Supp. 1982). See also *Andrews v. Ballard*, 498 F. Supp. 1038 (S.D. Tex. 1980) (acupuncture); *Bowland v. Municipal Court for Santa Cruz County*, 18 Cal. 3d 479, 556 P.2d 1081, 134 Cal. Rptr. 630 (1976) (midwifery).

native contractual approach for holistic practitioners. It will then analyze three hypothetical situations based on holistic health practice, first as actions grounded on negligence theory and then as actions based on contracts between the parties.

## II. THE CURRENT LEGAL SETTING: DRUGLESS HEALERS UNDER MEDICAL MALPRACTICE THEORY

To date the only cases reaching the appellate level that deal with health practitioners who are not physicians or surgeons have concerned chiropractors, podiatrists, naturopaths,<sup>29</sup> acupuncturists, and midwives.<sup>30</sup> No appellate civil case has yet appeared that deals solely with the energy-maintaining holistic assessments and therapies on which this Comment focuses. Appellate records reveal a few cases concerning midwifery and acupuncture brought by or against a state under state medical practice acts,<sup>31</sup> but the only civil malpractice cases that have reached appellate courts have been brought against chiropractors, podiatrists, and naturopaths.<sup>32</sup>

One is tempted to speculate on the reasons for this paucity of client actions against holistic practitioners. Are clients generally more content with their treatment than are physicians' patients? Do holistic therapies simply not cause the kind of harm or the kind of disappointments that lead to civil suits? Would damages be too difficult to determine? Do clients forego court action because practitioners are not heavily insured? Or do the losing parties, for some unknown reason, simply fail to appeal?

Answers to these questions are not available. It is clear, however, that so far courts have analyzed claims against drugless healers under negligence theories developed in malpractice suits against orthodox medical practitioners. The following survey of these theories shows that some may be appropriate when applied to holistic health practitioners if and when holistic healing cases reach civil courts, while others are at best cumbersome and at worst inimical to the goals and practices of holistic health. Particularly in determining the parties' reciprocal duties and the existence of an express warranty of results, a contract between the parties is preferable because it is explicit and it allows intentional variation from the norms supplied by tort law. A contract

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29. Naturopath: "a practitioner of naturopathy." Naturopathy: "a system of treatment of disease emphasizing assistance to nature and sometimes including the use of various medicinal substances (as herbs, vitamins, and salts) and certain physical means (as manipulation and electrical treatment)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1508 (1966).

30. See cases collected in Annot., 19 A.L.R.2D 1188-1224 (1951 & Supp. 1982).

31. *Andrews v. Ballard*, 498 F. Supp. 1038 (S.D. Tex. 1980) (state residents seeking acupuncture treatment challenged restrictive licensing rule on grounds that it violated their right to choose health treatment—and, therefore, their right of privacy—by effectively eliminating the practice of acupuncture in the state); *Bowland v. Municipal Court for Santa Cruz County*, 18 Cal. 3d 479, 556 P.2d 1081, 134 Cal. Rptr. 630 (1976) (midwives charged with unlicensed practice of medicine claimed licensing statute unconstitutionally vague and overbroad).

32. See *infra* text accompanying notes 33-58.

also may encourage the parties to cooperate, a dynamic that is lacking when tort law defines the practitioner-client relationship.

## A. Tort Law

### 1. Appropriate Standard of Care

When a medical malpractice suit is brought as a negligence action, an important issue is the appropriate standard of care that the practitioner must meet to avoid liability. Most jurisdictions use the similar locality standard: a practitioner is "required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."<sup>33</sup> A minority of jurisdictions still use the strict locality rule, in which the practice of other physicians in the same community defines the standard of care.<sup>34</sup>

Drugless healers must comply with the similar locality standard, defined in two early cases as the practice of others from the same school.<sup>35</sup> In the 1936 case of *Hardy v. Dahl*<sup>36</sup> the North Carolina Supreme Court held that the standard of care for a naturopath is based on his own school of practice and on the treatment he holds himself out to practice. The naturopath defendant was not required to possess the highest degree of skill recognized by the *medical* profession.<sup>37</sup> In 1951 the Michigan Supreme Court focused on the same school concept in *Bryant v. Briggs*.<sup>38</sup> There, the defendant osteopath had performed a thyroidectomy on the plaintiff's decedent; the patient died the following day. The plaintiff argued unsuccessfully that the osteopath should be held to the standards of the medical profession and attempted to introduce expert testimony by a medical surgeon to establish the osteopath's standard of care.<sup>39</sup> In upholding a directed verdict for the defendant, the court stated that the defendant had fully performed his duty to use methods prescribed by the profession of osteopathy.<sup>40</sup>

In a more recent case against a podiatrist, *Dolan v. Galluzzo*,<sup>41</sup> the Illinois Supreme Court tied the same school standard to state licensing requirements. In *Dolan* a patient brought suit against the defendant podiatrist for performing allegedly negligent surgery on his foot. In granting the defen-

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33. RESTATEMENT (SECOND) OF TORTS § 299A (1965). In Prosser's words, "[B]y undertaking to render medical services . . . [the physician] will ordinarily be understood to hold himself out as having standard professional skill and knowledge." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32 (4th ed. 1971).

34. W. PROSSER, *supra* note 33, § 32.

35. See, e.g., *Dolan v. Galluzzo*, 77 Ill. 2d 279, 396 N.E.2d 13 (1979); *Bryant v. Briggs*, 331 Mich. 64, 49 N.W.2d 63 (1951); *Ferguson v. Gonyaw*, 64 Mich. App. 685, 236 N.W.2d 543 (1975); see also Annot., 85 A.L.R.2D 1022-32 (1962 & Supp. 1979); Annot., 19 A.L.R.2D 1188-1224 (Supp. 1970).

36. 210 N.C. 530, 187 S.E. 788 (1936).

37. *Id.*

38. 331 Mich. 64, 49 N.W.2d 63 (1951).

39. *Id.* at 67-69, 49 N.W.2d at 65-66.

40. *Id.* at 72, 49 N.W.2d at 67.

41. 77 Ill. 2d 279, 396 N.E.2d 13 (1979).

dant's motion *in limine* to exclude the testimony of a physician on the standard of care that a podiatrist owes his patients, the court noted that by regulating various kinds of practice the legislature had recognized differing schools of practice but did not favor any one over the others.<sup>42</sup>

Who is qualified to testify on the appropriate standard of care was the central issue in *Whitehurst v. Boehm*.<sup>43</sup> Plaintiff sued his podiatrist for negligence when surgery to remove a scar on his foot resulted in infection, necessitating further surgery by an orthopedic surgeon.<sup>44</sup> In upholding the trial court's refusal to admit testimony by an orthopedic surgeon on the standard of care in orthopedic surgery, the appellate court stated that "[t]he standard of care required of a podiatrist cannot be established through testimony of an orthopedic surgeon [on the standard of care in orthopedic surgery] who is not familiar with the practice of podiatry; it can only be established by the testimony of another podiatrist or one equally familiar with that field of practice."<sup>45</sup>

Two problems would arise if courts should apply the same school standard of care to all types of holistic practitioners. First, not all holistic practitioners must be licensed by the state.<sup>46</sup> Since licensing helps to define a school and provides official legislative recognition of a practice, schools in unlicensed areas are less readily defined by courts.<sup>47</sup> When licensing requirements do not regulate a holistic practice or when divergence of opinion exists within a developing holistic field, it is difficult to determine who should set the standard of care for the rest of the field. The unfair result may be that anyone who does not need a license or who does not practice under the principles of a recognized school will automatically be judged a charlatan,<sup>48</sup> without an individual evaluation of competence.

The second problem with applying the similar school standard of care to holistic healers is that in some localities few practitioners of any given therapy may be available to testify. This will be true both when a small number of

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42. *Id.* at 284, 396 N.E.2d at 15-16. See also W. PROSSER, *supra* note 33, § 32, at 163 n.50. When there are differing schools of thought, the court judges a doctor by the beliefs and procedures of the school he follows. When a legislature recognizes a method of treatment through licensing requirements, courts must accept it as a recognized school. 77 Ill. 2d 279, 284, 396 N.E.2d 13, 16 (1979).

43. 41 N.C. App. 670, 255 S.E.2d 761 (1979).

44. *Id.* at 671-72, 255 S.E.2d at 763-64.

45. *Id.* at 674, 255 S.E.2d at 765. Testimony of practitioners from another school may be admissible for some purposes, however. In *Creasey v. Hogan*, 292 Or. 154, 637 P.2d 114 (1981), an orthopedic surgeon was allowed to give his opinion concerning defendant podiatrist's treatment of a condition that is treated in the same way by podiatrists and orthopedic surgeons. The court distinguished the use of the surgeon's testimony to show defendant's possible negligence, which was permissible, from use of the testimony to establish the podiatrist's duty of care to his patients, which was not. *Id.* at \_\_\_, 637 P.2d at 122. See also *Frazier v. Hurd*, 380 Mich. 291, 157 N.W.2d 249 (1968).

46. For example, iridologists and Rolfers, the practitioners discussed in the hypotheticals (see *infra* text accompanying notes 165-67 & 186-94) need not be licensed under state laws.

47. See *infra* text accompanying notes 84-86.

48. See, e.g., *Hansen v. Pock*, 57 Mont. 51, 187 P. 282 (1920) (herbologist held to standards of surgical and medical practice absent a readily identified school of herbology).

practitioners are active in a community and when fear of arrest for unlicensed practice of medicine keeps holistic practitioners from working openly.<sup>49</sup>

Some of these difficulties would be obviated by establishing a practitioner's duties through agreement with an informed client. Reluctant or unavailable expert testimony would not be needed to determine the standard of care; the duties would be explicit in the agreement. Moreover, an externally defined and judicially imposed standard of care conflicts with the premise of individual responsibility on which holistic health care rests. A contractual agreement allows the parties to allocate responsibilities as they see fit.

## 2. Duty to Refer Clients

Tort law requires drugless healers to refer their patients to medical practitioners "when the situation obviously calls for it."<sup>50</sup> This principle was articulated in *Kelly v. Carroll*<sup>51</sup> in 1950. Plaintiff's decedent consulted defendant naturopath for abdominal pains and was treated with hot and cold packs, electrical massage, and laxatives. The patient's condition worsened, but defendant threatened to abandon the case if patient's wife called a physician. After twelve days the wife finally summoned a physician. His diagnosis of appendicitis came too late, however, and the patient died shortly thereafter.<sup>52</sup> The court held for the plaintiff, stating that drugless healers must be trained to recognize when their methods are ineffective<sup>53</sup> and must, in such cases, refer patients to medical practitioners.<sup>54</sup>

Dramatic and bizarre fact patterns of this kind are rare in the legal literature on drugless healers. A recent case, *Mostrom v. Pettibon*,<sup>55</sup> is more helpful in analyzing a practitioner's duty to refer. In *Mostrom* the plaintiff consulted defendant chiropractor for abdominal and back pain caused by two back injuries. After taking X-rays the chiropractor adjusted the plaintiff's spine on several occasions. At trial the parties disagreed over whether defendant had recommended a neurological consultation, but in any event plaintiff eventually saw a neurologist, who diagnosed an obstruction in the spinal cord. Ensuing corrective surgery left plaintiff with severely limited use of his arms and legs. He sued the chiropractor for failing to refer him promptly to a medical practitioner.<sup>56</sup>

In holding that the evidence was sufficient for the case to go to the jury, the court in *Mostrom* stated that a licensed chiropractor's duty of care has

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49. See, e.g., PARG STUDY, *supra* note 9, at 47-48. The body workers, psychic healers, spiritualists, and nutritionists surveyed need not be licensed in California. The report indicates that they constantly fear arrest for practicing medicine without a license.

50. *Kelly v. Carroll*, 36 Wash. 2d 482, 498, 219 P.2d 79, 88, cert. denied, 340 U.S. 892 (1950). See generally Annot., 58 A.L.R.3d 590, 591 (1977); Annot., 19 A.L.R.2d 1188, 1206 (1951 & Supp. 1970).

51. 36 Wash. 2d 482, 219 P.2d 79, cert. denied, 340 U.S. 892 (1950).

52. *Id.* at 486, 219 P.2d at 81-82.

53. *Id.* at 492, 219 P.2d at 85.

54. *Id.* at 497-98, 219 P.2d at 88.

55. 25 Wash. App. 158, 607 P.2d 864 (1980).

56. *Id.* at 159-61, 607 P.2d at 865-66.

three parts: (1) to identify problems that are purely medical, in contrast to those that are amenable to chiropractic treatment; (2) to refrain from chiropractic treatment when a reasonable chiropractor should know that it is not appropriate and "may aggravate the condition";<sup>57</sup> and (3) to refer patients to a medical practitioner when medical treatment is indicated.<sup>58</sup>

The duty to refer can easily be included in a contract. Such a clause can protect both practitioner and client when a condition is discovered that is not responsive to the holistic practitioner's techniques. After describing to the client what a proposed treatment can and cannot do, the practitioner need only include a term confirming (1) that he or she does not treat disease and conditions beyond the scope of his or her practice and (2) that if such conditions become apparent the client should consult a physician,<sup>59</sup> preferably with the practitioner's assistance.

### 3. Defenses

Assumption of risk as a defense in negligence suits against drugless healers was recognized in *Hardy v. Dahl*,<sup>60</sup> a 1936 case in which a father brought his infant to a naturopath for treatment of what both the parent and the practitioner thought was tonsillitis. When the child died of diphtheria two weeks later, the father sued the naturopath. The court noted that the father believed in naturopathic medicine, had engaged the defendant repeatedly to treat other members of his family, and did not believe in the use of diphtheria antitoxin unless absolutely necessary.<sup>61</sup> Although the court recognized that plaintiff had assumed the risk of standard naturopathic treatment, the case was remanded for a new trial to determine whether defendant had been negligent according to the standards of the naturopathic profession. If the trial court were to find that defendant's actions had been negligent, plaintiff, of course, would merit a recovery.<sup>62</sup>

The defense of assumption of risk has succeeded in several other cases. In *Bryant v. Biggs*<sup>63</sup> the court

assumed that plaintiff's decedent was aware that defendants were osteopathic practitioners and that for reasons satisfactory to himself he sought treatment from them for the cure or alleviation of his condition. . . . Plaintiff is not in position [*sic*] to complain that the methods and standards of practice . . . observed by another school were not followed.<sup>64</sup>

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57. *Id.* at 163, 607 P.2d at 867.

58. *Id.* *Accord* *Tschirhart v. Pethel*, 61 Mich. App. 581, 584, 233 N.W.2d 93, 95 (1975).

59. For further discussion of referrals in the context of contract, see *infra* text accompanying notes 163 & 180.

60. 210 N.C. 530, 187 S.E. 788 (1936).

61. *Id.* at 531-33, 187 S.E. at 788-89.

62. *Id.* at 532, 187 S.E. at 789. The outcome of the new trial has not been reported.

63. 331 Mich. 64, 49 N.W.2d 63 (1951). See *supra* text accompanying notes 38-40.

64. 331 Mich. 64, 72-73, 49 N.W.2d 63, 68.



The court went on to say that a patient who "selects a practitioner of a recognized school of treatment" adopts the methods of that school.<sup>65</sup> Unlike *Hardy*, the plaintiff in *Bryant* did not charge that the defendant had failed to comply with the standards of his own school.

In *Whitehurst v. Boehm*<sup>66</sup> "plaintiff elected to undergo foot surgery by one other than a pure medical or surgical practitioner. Under prevailing law, he cannot now complain that the mode of treatment employed by one he voluntarily selected was less than the most competent available in the world of medicine."<sup>67</sup> The court observed that it is the legislature's duty to ensure "that the innocent layman knows the limitations of those engaged in the medically 'allied occupations.'"<sup>68</sup> Thus, the legislature must see that adequate information is available, even though the choice of practitioner rests ultimately with the patient.

These cases establish that when a knowledgeable client chooses a drugless healer, he or she assumes the risks of that school's standard practice. In addition, *Hardy* indicates that a client does not assume the risk of the negligent practice of that method and that one who selects a drugless healer is still protected by law from incompetence.

Although contributory negligence is a possible defense,<sup>69</sup> it has not been significant in cases against drugless healers, perhaps because these cases can be easily disposed of with assumption of risk. Both contributory negligence and assumption of risk are particularly appropriate defenses in a holistic health setting since clients must assume responsibility for their own care.<sup>70</sup> A written agreement between the parties would not only clarify a client's standard of care for his or her own health and safety (the issue in contributory negligence),<sup>71</sup> but would also define the risks a client assumes by specifying the limits of the proposed therapy.<sup>72</sup>

### B. Breach of Warranty in Medical Malpractice

Some malpractice cases are brought on grounds of both breach of warranty and negligence. The general rule covering physicians' liability under

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65. *Id.* at 73, 49 N.W.2d at 68 (quoting 70 C.J.S. *Physicians and Surgeons* § 44 (1951)).

66. 41 N.C. App. 670, 255 S.E.2d 761 (1979). See *supra* text accompanying notes 43-45.

67. 41 N.C. App. 670, 677, 255 S.E.2d 761, 767 (1979). See also *Spead v. Tomlinson*, 73 N.H. 46, 59 A. 376 (1904) (patient who engaged Christian Science practitioner for appendicitis could not complain that treatment was improper); *Kirschner v. Keller*, 70 Ohio App. 111, 42 N.E.2d 463 (1942) (epileptic patient discontinued anti-epileptic drug on chiropractor's advice, knowing the consequences; the court said the patient submitted to treatment with full knowledge of the risk).

68. 41 N.C. App. 670, 677, 255 S.E.2d 761, 767 (1979).

69. In *Champs v. Stone*, 74 Ohio App. 344, 58 N.E.2d 803 (1944), the court held that a patient who allowed an obviously intoxicated physician to administer a hypodermic injection was contributorily negligent in the resulting injury. This case, however, did not concern the choice of a drugless practitioner; defendant was a medical doctor.

70. See *supra* text accompanying notes 8-11.

71. RESTATEMENT (SECOND) OF TORTS § 463 (1965).

72. See *infra* text accompanying notes 179-81.

contract provides that a physician may "contract to cure his patient, or to accomplish a particular result, . . . [and] may be liable for breach of contract when he does not succeed."<sup>73</sup> Without an express agreement, however, there is no warranty of results.<sup>74</sup> Some courts also require that an express warranty of results be supported by consideration separate from the fee for service.<sup>75</sup>

The problem becomes one of interpretation: which promises are express and which implied? Courts have found the following statements to be express (actionable) promises: (1) Proposed abdominal surgery would take "care of all your troubles . . . [y]ou can eat as you want to . . . [Y]ou can throw your pill box away";<sup>76</sup> (2) proposed hand surgery would make the hand "a hundred percent perfect";<sup>77</sup> and (3) removal of a growth by a certain procedure would effect a cure.<sup>78</sup> Mere opinions regarding efficacy of treatment, however, are not actionable.<sup>79</sup>

In *Cirafici v. Goffen*,<sup>80</sup> a 1980 Illinois case, a dental patient alleged that her dentist induced her to permit insertion of dental implants by promising that she would be able to eat corn on the cob and other foods that she could not eat with her dentures. After two and a half years, during which time the plaintiff had been unable to eat anything other than soft foods and had suffered constant pain, the dentist removed the implants and substituted new dentures.<sup>81</sup> The count of dental negligence was still pending when the appellate court reversed the lower court's dismissal of the breach of warranty action. The appellate court held that the contract to cure was explicit and, therefore, actionable and that no additional compensation was needed because the promise had been made as an inducement to enter into the original contract.<sup>82</sup>

The *Cirafici* court based its holding on several circumstances that would also exist in contractual agreements between holistic practitioners and their clients. This was a nonemergency situation in which both parties had had an opportunity to evaluate the bargain. Moreover, language of the parties

73. W. PROSSER, *supra* note 33, § 32.

74. See *Gault v. Sideman*, 42 Ill. App. 2d 96, 191 N.E.2d 436 (1963); Annot., 43 A.L.R. 3d 1221 (1972).

75. See, e.g., *Cirafici v. Goffen*, 85 Ill. App. 3d 1102, 1106-07, 407 N.E.2d 633, 636 (1980); see also Tierney, *Contractual Aspects of Malpractice*, 19 WAYNE L. REV. 1457, 1463 (1973).

76. *Guilmet v. Campbell*, 385 Mich. 57, 63, 188 N.W.2d 601, 603-04 (1971). But see Tierney, *Contractual Aspects of Malpractice*, 19 WAYNE L. REV. 1457 (1973), which criticizes this case and others that recognize an express contract to cure even without proof of explicit words of guarantee. Tierney believes that such holdings discourage physicians from communicating optimism to their patients.

77. *Hawkins v. McGee*, 84 N.H. 114, 115, 146 A. 641, 643 (1929).

78. *Robins v. Finestone*, 308 N.Y. 543, 545, 127 N.E.2d 330, 331 (1955).

79. See, e.g., *Rogala v. Silva*, 16 Ill. App. 3d 63, 66, 305 N.E.2d 571, 573-74 (1973) (physician's warning that sterilization operation would render plaintiff unable to bear children judged to be a statement of opinion and not a warranty of results); *Gault v. Sideman*, 42 Ill. App. 2d 96, 191 N.E.2d 436 (1963) (surgeon's statement that herniated disk could be cured by surgery did not constitute warranty of cure); *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1929) (physician's prediction that patient would be hospitalized for three or four days and then would be able to return to work was merely an opinion).

80. 85 Ill. App. 3d 1102, 407 N.E.2d 633 (1980).

81. *Id.* at 1102-03, 407 N.E.2d at 633-34.

82. *Id.* at 1107, 407 N.E.2d at 636-37.

showed their intent. Finally, the requested damage award covered only the cost of the implants and dentures and did not reflect a disguised tort-based claim for pain and suffering or punitive damages.<sup>83</sup> The court implied that when these elements are present an express contract should be recognized even though a tort action would also be possible. If the parties reach a written agreement before treatment begins, that language would reflect their actual intent and the terms of the bargain, thus reducing the need for courts to imply terms. The parties would also have time to consult lawyers for advice before finalizing the agreement.

### C. Licensing Requirements

State licensing statutes provide holistic healers with a third area of concern in the current legal approach to health care. Problems arise not from requirements that certain practices be licensed but from the broad scope of the medical practice acts' definitions of "practicing medicine." In Ohio, for example, the definition is relatively broad: anyone who "*examines or diagnoses for compensation of any kind, . . . for the cure or relief of a wound, fracture, or bodily injury, infirmity, or disease*"<sup>84</sup> is practicing medicine. The California definition is broader still and includes diagnosis of, or treatment for, any "physical or mental *condition* of any person."<sup>85</sup> When definitions are broad and medical boards or courts have wide discretion in interpreting them, unlicensed practitioners and those with limited licenses cannot determine what actions are within legal bounds. Thus it is easy for these practitioners to step inadvertently out of their own small circles into the area of practicing medicine without a license, an act that carries criminal penalties.<sup>86</sup> Besides creating a fear of arrest, which may limit the number of holistic practitioners willing to work openly, licensing reinforces the concept of an externally imposed standard of care.<sup>87</sup>

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83. *Id.*

84. OHIO REV. CODE ANN. § 4731.34 (Page 1977) (emphasis added).

85. CAL. BUS. & PROF. CODE § 2052 (West Supp. 1982) (emphasis added). The full text of this section reads:

Any person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked, or unsuspended certificate as provided in this chapter, or without being authorized to perform such act pursuant to a certificate obtained in accordance with some other provision of law, is guilty of a misdemeanor.

*Id.*

Whatever the statutory definition of practicing medicine may be, courts and medical boards are always free to devise their own interpretations, sometimes creating absurd results. For example, a medical board interpreted "surgery" to include ear piercing by a jeweler. The ruling was reversed in *Hicks v. Arkansas State Medical Bd.*, 260 Ark. 31, 537 S.W.2d 794 (1976).

86. W. WADLINGTON, J. WALTZ & R. DWORKIN, *CASES AND MATERIALS ON LAW AND MEDICINE* 43 (1980). The extent to which states prosecute unlicensed practitioners is difficult to determine because most charges are brought by local agencies whose records are seldom available to the public. PARG STUDY, *supra* note 9, at 15.

87. See *supra* text accompanying notes 33-49.

The policy behind state licensing requirements "is to protect the public by assuring minimum standards of competence" in the healing professions.<sup>88</sup> This regulatory power is justified by the assumption that "the practice of medicine requires special knowledge, training, skill and care, that health and life are committed to the physician's care, and that patients ordinarily lack the knowledge and ability to judge his qualifications."<sup>89</sup> Licensing statutes and medical boards, however, are not completely effective in protecting the public. Once granted, medical licenses are virtually irrevocable except when the licensee is found guilty of a crime or of gross misconduct.<sup>90</sup> Moreover, disciplinary procedures may be difficult to enforce. On the same day that his license is revoked, a doctor may obtain a court stay allowing him to continue to practice.<sup>91</sup>

A 1981 study of health care regulation in California suggests that the elements which most strongly influence the quality of health care—the choice of appropriate treatment, the equipment and technology used, and the skill of practitioners—may lie beyond a medical board's powers and, therefore, be unaffected by licensing requirements.<sup>92</sup> While a medical board can set minimum standards of practice, nongovernmental regulation of health care (for example, by training institutions or peer oversight groups)<sup>93</sup> may more effectively ensure quality health care because it generally results in higher standards than does official licensure.<sup>94</sup>

Of particular interest to holistic health practitioners is the study's suggestion that the statutory definition of practicing medicine be replaced with title licensure, under which only licensed physicians would perform surgery and prescribe drugs and other practitioners with the requisite training would be allowed to perform other enumerated procedures. Practitioners employing therapies that are not statutorily specified would be allowed to work provided they did not use any of the titles reserved to licensed practitioners.<sup>95</sup> Given

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88. REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE, DHEW PUBLICATION NO. (OS) 73-88 at 51 (1973) [hereinafter cited as SECRETARY'S REPORT]; see also *Reetz v. Michigan*, 188 U.S. 505 (1903).

89. *Aitchison v. State*, 204 Md. 538, 544, 105 A.2d 495, 498 (1954).

90. SECRETARY'S REPORT, *supra* note 88, at 52. Long delays between the filing of the complaints and the hearings are also common. The *New York Times* reported a recent case in which a hearing occurred 28 months after the Massachusetts Licensing Board had filed a complaint against a physician. The doctor had pleaded guilty to indictments which alleged that he had placed a "malicious interest in making more money" over the lives of his patients. Attributing the delay to "lack of resources," the Board's lawyer said that such delays occur "with embarrassing regularity." N.Y. Times, Oct. 6, 1982, at 11, col. 1.

91. SECRETARY'S REPORT, *supra* note 88, at 53. Under such a court stay two doctors in New Mexico who were found guilty of fraud accumulated \$1.5 million in malpractice judgments against them in two years. A Denver physician was found to have caused at least two deaths and two cases of permanent injury while his revocation was suspended. *Id.*

92. PARG STUDY, *supra* note 9, at 13.

93. *Id.* (quoting Forgotson & Cook, *Innovations and Experiments in Uses of Health Manpower—The Effects of Licensure Laws*, 32 LAW & CONTEMP. PROBS. 733 (1967)).

94. PARG STUDY, *supra* note 9, at 13. In contrast to this suggestion, consider a physician's statement, made at one of the California Medical Board hearings, that licensure is required to preserve the income and prestige of physicians and that these in turn ensure quality health care. *Id.* at 33.

95. *Id.* at 58-59.

clear descriptions of what a licensee may do (and of what others may not do), nontraditional health practitioners would be free to pursue their work with less risk of inadvertently practicing medicine.

Because licensing requirements may not guarantee client protection, and because imprecise definitions of practicing medicine may inhibit holistic practice through fear of arrest and imposition of external standards of care, individual arrangements between the parties are advantageous in some circumstances. Particularly in holistic therapies in which the potential for harm is low (requiring less protection by the state) and client responsibility is high, practitioner-client agreements may provide adequate protection and greater flexibility for both parties.<sup>96</sup>

### III. AN ALTERNATIVE CONTRACTUAL APPROACH TO HOLISTIC HEALTH CARE

The effectiveness of holistic health care depends on a vigorous, cooperative relationship between the parties. When the client carries considerable responsibility for his or her own improvement, he or she must actively participate in the healing process and cannot merely accept the practitioner's ministrations. Tort-based rules in medical malpractice, however, grounded on the "reasonable person" and "similar practice" standards,<sup>97</sup> downplay individual responsibility. Therefore, because the needs, pressures, and circumstances that affect each client's well-being are unique, the rules governing medical negligence cases are inappropriate. In contrast, contractual agreements between the parties acknowledge each client's uniqueness and reflect the actual distribution of responsibilities for health care.

#### A. Reasoning for a New Approach

Professor Epstein of the University of Chicago suggests that physicians contract with their patients to establish a standard of care.<sup>98</sup> He cites the "expansion of defendant's liability" as "[t]he most striking trend in the law of tort"<sup>99</sup> and explains that, in the malpractice field, recent changes have increased the physician's potential liability so that it approaches strict liability.<sup>100</sup> Epstein suggests that judicial insistence on a negligence approach to medical malpractice cases explains this development. The physician's duty of care to his or her patients arises in both tort and contract. Therefore, he observes, greater emphasis on the contractual elements of the physician-

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96. For further discussion of protection and flexibility under contracts in holistic practice, see *infra* text accompanying notes 179-85, 204-09 & 216.

97. See *infra* text accompanying note 111 and *supra* text accompanying note 33.

98. Epstein, *Medical Malpractice: The Case for Contract*, 1 AM. BAR. FOUND. RESEARCH J. 87 (1976).

99. *Id.* at 91. Epstein notes the reduced acceptance of contributory negligence and assumption of risk as defenses and says that in the field of products liability the theory of privity of contract has given way to strict liability. *Id.* at 91-92.

100. *Id.* at 98.

patient relationship will create a better balance of responsibilities and distribution of the risks of health care.<sup>101</sup>

Epstein reasons that when parties to a suit are strangers, a tort claim is the only possible solution.<sup>102</sup> But "where the parties have entered into a consensual relationship, the problem assumes in the end a contractual dimension even if the subject matter of the particular case is the physical harm to the plaintiff."<sup>103</sup> Since without the consensual relationship between physician and patient the physician would have no duty of affirmative action, a physician's liability should be analyzed under the contract.<sup>104</sup>

The unique consensual relationship between physician and patient means that contract law may be more appropriate in this situation than tort law because tort theory "works best at keeping people apart, not bringing them together."<sup>105</sup> The essence of a healing relationship, particularly in holistic health, is cooperation of the parties to reach a desired result. Preoccupation with implicit legal duties and standards interferes with the effectiveness and efficiency of this practitioner-patient relationship and may cause defensive practice by physicians who fear lawsuits.<sup>106</sup>

Although Epstein addresses his contractual scheme primarily to reducing the liability of physicians and the size of awards granted against them, his ideas also fit the goals and practices of holistic health. A well-drawn contract can clarify expectations and allocate responsibilities. Contracting may make a court's task simpler, may keep many cases of disappointed expectations out of court, and may encourage greater client input in the healing relationship.<sup>107</sup>

### *B. Informed Consent: The Linchpin Between Tort and Contract*

The doctrine of informed consent is the linchpin in this shift of emphasis from tort to contract law. A physician's duty to inform rests on the conviction that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."<sup>108</sup> Courts believe that patients have an "abject" dependence on physicians for information needed to make this determination.<sup>109</sup> Therefore, the doctrine of informed consent defines a physician's duty to disclose to a patient the risks inherent in proposed treatment or surgery so that the patient may decide intelligently whether to submit to the procedure.<sup>110</sup> If patients are capable of giving in-

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101. *Id.* at 105-06.

102. *Id.* at 94.

103. *Id.*

104. *Id.* at 102.

105. *Id.* at 94.

106. *Id.* at 107 n.43.

107. To a limited extent, contracting occurs with express warranties; see *supra* text accompanying notes 80-83. Most express warranties, however, are unwritten and require considerable court interpretation. For a discussion of contracts in holistic health practice, see *infra* text accompanying notes 179-85, 205-09 & 216.

108. *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914), *overruled on other grounds*, *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3 (1957).

109. *Canterbury v. Spence*, 464 F.2d 772, 782 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

110. *Id.* at 786.

formed consent to a procedure, presumably they are also capable of making express contractual agreements with practitioners based on the same information.

The scope of required disclosure remains the key issue in informed consent actions. Most jurisdictions follow a professional standard, under which a physician must follow either the standard of other physicians in the same or a similar community, or the standard of a "reasonable medical practitioner."<sup>111</sup> The professional medical community determines what information a physician must disclose to a patient, thus placing on the plaintiff the burden of proving through expert testimony the customary practice.<sup>112</sup>

The modern trend, however, while still a minority approach, anchors the scope of a physician's duty to disclose in the patient's right to be told of all risks that might be material to an intelligent decision regarding treatment. Two 1972 cases define this materiality rule.

In *Canterbury v. Spence*<sup>113</sup> the defendant physician was charged with failure to divulge the possible consequences of a laminectomy.<sup>114</sup> In reversing the lower court's judgment for defendant and ordering a new trial, the Court of Appeals for the District of Columbia held that a physician's obligation to his patient includes disclosure of all information that may be material to the patient's decision.<sup>115</sup> The court criticized the professional standard of disclosure, arguing that it is wrong to regard medical practice as the source of a physician's obligation to disclose. First, that standard encourages a conspiracy of silence between physicians who are eager to protect one another. Second, it invites statements of individual opinion on what prevailing standards should be, rather than requires expert testimony on what the practice really is. Third, it ignores the patient's individual circumstances. Last, and most important, it gives primary decision-making power to the physician rather than the patient and thus violates the patient's right to self-determination.<sup>116</sup> *Canterbury* establishes that the scope of the duty to disclose is "measured by the patient's need, and that need is the information material to the decision."<sup>117</sup>

In *Cobbs v. Grant*<sup>118</sup> the California Supreme Court further developed the materiality rule, basing its decision on the premise that "[u]nlimited discretion in the physician is irreconcilable with the basic right of the patient to make the ultimate informed decision regarding the course of treatment to which he knowledgeablely consents to be subjected."<sup>119</sup> The court emphasized

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111. J. LUDLAM, INFORMED CONSENT 27 (1978).

112. *Id.* at 28-29.

113. 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

114. *Id.* at 778. Laminectomy: "excision of a vertebral lamina; commonly used to denote removal of a posterior arch." STEDMAN'S MEDICAL DICTIONARY 758 (23d ed. 1976).

115. 464 F.2d 772, 786 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

116. *Id.* at 783-84.

117. *Id.* at 786.

118. 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

119. *Id.* at 243, 502 P.2d at 10, 104 Cal. Rptr. at 514.

that while the physician may appreciate the risks of procedures he proposes and the risks of a decision to refuse treatment, only the patient is able to weigh "these risks against [his] subjective fears and hopes . . . Such evaluation and decision is a nonmedical judgment reserved to the patient alone."<sup>120</sup> The *Cobbs* court explained the bases for the materiality rule:

Preliminarily we employ several postulates. The first is that patients are generally persons unlearned in the medical sciences and therefore, except in rare cases, courts may safely assume the knowledge of patient and physician are not in parity. The second is that a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment. The third is that the patient's consent to the treatment, to be effective, must be an informed consent. And the fourth is that the patient, being unlearned in medical sciences, has an abject dependence upon and trust in his physician for information upon which he relies during the decisional process, thus raising an obligation in the physician that transcends arms-length transactions.<sup>121</sup>

Both *Canterbury* and *Cobbs* establish an objective test for materiality: "material" information is not what this patient would, in hindsight, have considered important, but what a reasonable person in the patient's position would want to know in making a decision.<sup>122</sup> The *Canterbury* court considered the following information essential: (1) Potential hazards of treatment, (2) alternatives to proposed treatment, (3) results likely if treatment is refused, and (4) the likelihood and magnitude of possible harm.<sup>123</sup> The physician is not required to disclose risks of which the patient is aware, risks that are common knowledge, and risks that are unknown to the medical community;<sup>124</sup> nor is disclosure required in emergencies or when the success of treatment depends on nondisclosure (therapeutic privilege).<sup>125</sup>

The materiality rule is particularly appropriate to holistic health practice because it rests on the premise that patients have the right to make decisions affecting their own bodies. Accordingly, the exchange of information between physician and patient is critical to the exercise of this right, and patients are assumed capable of making "informed" decisions. In the field of holistic health care clients shoulder major responsibility for the success of treatment, and procedures are more readily explained and understood than in surgery and other complex medical procedures. If clients can obtain enough medical information from practitioners to give the required informed consent, as the doctrine assumes, they can use the same information to forge agreements that

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120. *Id.*

121. *Id.* at 242, 502 P.2d at 9, 104 Cal. Rptr. at 513.

122. *Canterbury v. Spence*, 464 F.2d 772, 787, 791 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); *Cobbs v. Grant*, 8 Cal. 3d 229, 245, 502 P.2d 1, 11-12, 104 Cal. Rptr. 505, 515-16 (1972).

123. 464 F.2d 772, 787-88 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

124. J. LUDLAM, *supra* note 111, at 37. Less frequently mentioned exceptions to the rule include risks that are incurred only when a procedure is carried out incorrectly, and a patient's request that he not be informed. *Id.*

125. *Canterbury v. Spence*, 464 F.2d 772, 788-89 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).



specify not only the risks entailed in a procedure (which valid informed consent currently requires) but also clients' expectations about the extent of "cure," practitioners' reasonable estimates of results, and the responsibilities of each party.

The test of causality in an informed consent case remains a problem under both the materiality rule and the professional standard. The plaintiff must show that "his injury resulted from a risk that should have been, but was not, disclosed";<sup>126</sup> he or she must also show that had disclosure been made, he or she would not have submitted to the procedure.<sup>127</sup> Under the materiality rule the test is objective: causality exists if a "prudent person in the patient's position" would have decided against the procedure had the person been adequately informed of its potential risks.<sup>128</sup> In contrast, the traditional standard uses a subjective test based on what this particular patient would have decided had the risks been disclosed.<sup>129</sup>

The *Canterbury* court echoed a major criticism of the traditional rule in informed consent: the rule determines the scope of disclosure and the issue of causality ("Would this patient have rejected treatment if additional facts had been disclosed?") based on the patient's hindsight, after the harm has occurred.<sup>130</sup> The materiality rule draws fire because it imposes a heavy burden on physicians, who will spend more time in educating patients than in diagnosing and treating them.<sup>131</sup>

These criticisms are less germane when the doctrine of informed consent is transposed into a contractual arrangement between a holistic health practitioner and his or her client. The scope of the duty to disclose is defined before the therapeutic relationship is formalized, and individualized terms that reflect the unique informational needs of each client can be incorporated into the contract. This obviates the need for proof of causality. Furthermore, when procedures are neither highly technical nor highly risky, clients will more readily understand them—without imposing an intolerable burden of client education on the practitioner.

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126. J. LUDLAM, *supra* note 111, at 33-34.

127. *Id.* at 34; *see also* *Canterbury v. Spence*, 464 F.2d 772, 790 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

128. *Canterbury v. Spence*, 464 F.2d 772, 791 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

129. J. LUDLAM, *supra* note 111, at 34.

130. *Canterbury v. Spence*, 464 F.2d 772, 790 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

131. *Truman v. Thomas*, 27 Cal. 3d 285, 297-98, 611 P.2d 902, 909, 165 Cal. Rptr. 308, 315-16 (1980) (Clark, J., dissenting). In *Truman* the California Supreme Court extended the physician's duty to disclose to encompass the risks involved in failing to undergo diagnostic tests. The patient died of cervical cancer at the age of 30 after repeated refusals to undergo a diagnostic pap smear at defendant family physician's urging. Defendant had not explained the risks of refusing the test, assuming that a woman of childbearing age knew what they were. Justice Clark registered a strong dissent: it "will impose upon doctors the intolerable burden of having to explain diagnostic tests to healthy patients." *Id.* at 297, 611 P.2d at 909, 165 Cal. Rptr. at 315. He feared that the majority's decision will force physicians to spend too much time in educating patients and that the resulting increase in the cost of medical diagnosis will discourage people from visiting doctors. *Id.* at 298, 611 P.2d at 910, 165 Cal. Rptr. at 316.

*C. Limitations of a Contractual Approach**1. Criticisms*

Professor Epstein has addressed several objections to this contract arrangement. First, critics may contend that patients require court protection since their "abject dependence" on physicians for necessary information makes them powerless.<sup>132</sup> Epstein counters that a patient need not evaluate technical medical information, but will be more concerned with the physician's competence; he or she can investigate the doctor's training and reputation, shop around for a practitioner, switch physicians, or utilize a clinic that employs a variety of physicians.<sup>133</sup> The client's investigations should be less burdensome in the holistic field since much of the information will be easier for a layperson to evaluate. Prospective patients can also consult library references or confer with other physicians to obtain a second opinion. Admittedly, this kind of investigation will demand more time than most patients now give to their search for a physician, but it is consistent with the responsibility that holistic clients must assume for their own care. Of course, the effectiveness of client investigation depends on the availability of adequate and accurate information.

A second objection to allowing patients and physicians to contract is that the parties are in unequal bargaining positions. The physician, with greater knowledge and experience, may pressure the patient to agree to specific terms.<sup>134</sup> When a patient is inadequately informed or does not understand a proposed treatment, this kind of influence can be a very real danger. Given sufficient information, however, a client may be protected by competition from unequal bargaining power because he or she may consult with other practitioners before signing an agreement.<sup>135</sup> But if state regulation of holistic practices restricts the number of practitioners in a community, competition in that field will disappear.<sup>136</sup>

Third, although contracting may not protect patients from practitioner fraud or incompetence in all cases, Epstein suggests that the inability of a few people to contract wisely should not inhibit the rights of those who can protect their own interests and wish to make contractual arrangements from which they expect to benefit.<sup>137</sup> Again, adequate public information about practitioners is critical in guarding against fraud, whether in the traditional medical field or in holistic care. Title licensure<sup>138</sup> and professional organiza-

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132. Epstein, *Contracting Out of the Medical Malpractice Crisis*, 20 PERSPECTIVES IN BIOLOGY & MED. 228, 237 (1977).

133. *Id.* at 238.

134. *Id.* at 239.

135. *Id.*

136. See *supra* text accompanying notes 85-86.

137. Epstein, *supra* note 98, at 106.

138. See *supra* text accompanying note 95.

tions that establish standards of practice and review would provide additional protection.

Even when there has been unequal bargaining power or fraud, contracting does not leave a client without redress. A client who believes that he or she was unfairly persuaded to enter into an agreement can claim undue influence and, if successful, avoid the contract.<sup>139</sup> Although this cause of action will not help a plaintiff who has been injured, he or she will be able to recover fees paid<sup>140</sup> on showing (1) an opportunity for the other party to exert undue influence (a confidential relationship such as that between physician and patient is deemed evidence of such an opportunity<sup>141</sup>); (2) his or her own susceptibility as the subservient party; (3) the practitioner's disposition to exert undue influence; and (4) evidence of the "unnatural nature" of the agreement.<sup>142</sup> A client may also bring a tort action for misrepresentation, but will have to meet more demanding requirements: (1) representation, (2) falsity, (3) scienter, (4) deception, and (5) injury.<sup>143</sup> If successful, however, the client's recovery for injury could exceed the restitution of a contract remedy.<sup>144</sup>

If a client can show that a practitioner exerted pressure that constituted duress, he or she can, again, avoid the contract and recover the fees paid.<sup>145</sup> The client will have to show that, after the coercion was removed, he or she did not ratify the contract by accepting its benefits or by failing to avoid it promptly.<sup>146</sup> If the client has been injured he or she can also bring a tort action since coercion leading to a traditional tort is actionable in tort.<sup>147</sup>

Fourth, contracting in holistic practice may attract criticism because it creates a new need for legal advice. Will parties require lawyers at their elbows as they hammer out agreements? It is true that until practitioners and clients learn what terms are workable, they will need legal assistance. Moreover, they should have it. Yet in many cases it will be more efficient to define the parties' responsibilities and provide for foreseeable circumstances, with legal help, than to engage counsel only after harm has occurred.

## *2. Consequences of Electing Contract Rather than Tort as a Cause of Action*

When an action is possible in either tort or contract, choice of the contract cause of action may confer important advantages.<sup>148</sup> A contract action is

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139. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 9-10 (1977).

140. *Id.* § 9-12.

141. *Id.*

142. *Id.*

143. *Id.* § 9-13.

144. W. PROSSER, *supra* note 33, § 92.

145. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 9-13 (1977).

146. *Id.* § 9-8.

147. *Id.*

148. W. PROSSER, *supra* note 33, § 92. *See also supra* text accompanying notes 80-83.

preferable when the plaintiff can show that the practitioner failed to perform an express promise,<sup>149</sup> but cannot prove negligence<sup>150</sup> or injury. Contract theory also provides advantages to a plaintiff when a tort action is barred by the statute of limitations and when immunities shield the defendant from tort liability.<sup>151</sup> The defendant will benefit from an express contract when a disappointed patient or client brings suit, because expectations and responsibilities will be clear under the contract.<sup>152</sup>

A successful tort action, however, may permit the plaintiff greater monetary recovery<sup>153</sup> through awards for pain and suffering, punitive damages, and recovery for wrongful death. Damages for breach of contract are limited to those within the contemplation of the parties when the agreement was made<sup>154</sup> and may be restricted by the terms of the agreement itself.<sup>155</sup>

Thus, when the plaintiff is allowed to elect a cause of action, the wise choice will depend on how much he or she can prove and the extent of injury. When either tort or contract may be appropriate and the rules for recovery are inconsistent, case law is unclear whether plaintiff may elect the cause of action or must accept the court's decision.<sup>156</sup> Since holistic therapies that deal with energy and well-being carry neither the risks of serious harm nor the resulting high damage awards that are more prevalent in surgery and in drug administration, the tort cause of action would in many instances provide no marked advantages in recovery against a holistic practitioner.<sup>157</sup> Of course, when injury can be shown a client may recover the usual panoply of tort damages.

In any event, a tort action remains available when a contract fails for lack of proof, uncertainty, illegality, or other reasons.<sup>158</sup> Therefore, holistic practitioners and clients who wish to contract may do so without fear that a court will leave them without redress if it finds the parties' agreement invalid.

#### D. A Contractual Scheme Applied to Holistic Health Practice

How would contracting work in holistic practice? One commentator suggests that practitioner and client should include the following elements in their

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149. See *supra* text accompanying notes 73-83.

150. W. PROSSER, *supra* note 33, § 92.

151. *Id.* See also *Malone v. University of Kan. Medical Center*, 220 Kan. 371, 552 P.2d 885 (1976). In *Malone* plaintiff brought suit in contract rather than in tort because defendant hospital had governmental tort immunity under state law. However, since the claim was based on careless and incompetent treatment, the Kansas Supreme Court dismissed the contract cause of action.

152. Disappointed patient expectations have been blamed for the recent mushrooming of medical malpractice suits. Epstein, *supra* note 98, at 97. See also Green, *Responsibility for Health*, 2 J. HOLISTIC HEALTH 76, 77 (1977), and *infra* text accompanying notes 186-209.

153. W. PROSSER, *supra* note 33, § 92.

154. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854).

155. W. PROSSER, *supra* note 33, § 92.

156. *Id.* See also *supra* note 151 and text accompanying notes 80-83.

157. The court in *Cirafici v. Goffen*, 85 Ill. App. 3d 1102, 1107, 407 N.E.2d 633, 636-37 (1980), identified several elements that make a contract action acceptable even though a tort action would also be possible. See *supra* text accompanying notes 80-83.

158. W. PROSSER, *supra* note 33, § 92.

contract. (1) The purpose of the contract should be described, indicating that the parties have agreed on its terms. (2) The responsibilities of each party should be explicit. The client's expectations should be clear, and the contract should detail the specific skills, responsibilities, and decisions that are essential to the purpose and plan of the proposed therapy. (3) The contract should specify the duration of the relationship and a means of modification or renewal. It may also make provisions for the resolution of disputes.<sup>159</sup>

The process of making an agreement is as important as the terms themselves. The client should present a specific problem with which he or she needs help. He or she may want to start with a medical evaluation, particularly if an injury underlies the problem, and then seek a holistic practitioner for help in reversing patterns of stress that may have aggravated the condition.<sup>160</sup> A meaningful choice of practitioners is critical in this process. The client must be able to find a practitioner who is willing to agree to terms that the client finds important; in this way competition may reduce any difference in bargaining power.<sup>161</sup> The client may be able to determine whether a given practitioner belongs to a professional association whose standards will protect the client's own interest.

At least one case concerning a holistic practitioner who contracts with clients has reached the courts. An Oakland, California municipal court dismissed a charge of practicing medicine without a license, which had been brought against a naturopathic physician, on a showing that the defendant had begun to contract with clients to clarify what he could do as a nonmedical practitioner.<sup>162</sup> Written statements and medical referral forms indicated that the defendant had encouraged clients to consult medical practitioners for diagnosis and treatment of pathology that he was not trained to handle.<sup>163</sup>

Similar agreements in holistic health care relationships will have several benefits. The responsibility for health will be reallocated so that clients bear greater responsibility for their own care than in traditional medical relationships. Clients will be on notice that holistic practitioners cannot substitute for physicians in diagnosing and treating pathology. Contracting will allow the development of new health roles in the healing professions since practitioners will not be forced into existing licensing classifications. "Our greatest social gain will come from restraining our impulses to license and regulate these new professions before we have had an opportunity to develop concepts that are appropriate to them."<sup>164</sup>

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159. Green, *Legal Issues in a Health Revolution*, in THE HOLISTIC HEALTH HANDBOOK 392, 394 (1978).

160. A medical evaluation may help to define the purpose of the practitioner-client contract. It can also assist the client in evaluating the appropriateness of the holistic practitioner's methods in his or her particular case.

161. Epstein, *Contracting Out of the Medical Malpractice Crisis*, 20 PERSPECTIVES IN BIOLOGY & MED. 228, 239 (1977). See generally *supra* text accompanying notes 134-36.

162. *California v. Ullman*, No. 98,158, Municipal Court of Oakland, Piedmont Judicial District, Alameda County, March 9, 1977.

163. *Id.*

164. Green, *Legal Issues in a Health Revolution*, in THE HOLISTIC HEALTH HANDBOOK 392, 394 (1978). The *Provisional Ethical Standards* of the California Health Practitioners Association require practitioners to

#### IV. THE CONTRACT IN HOLISTIC HEALTH CARE: THREE HYPOTHETICAL SITUATIONS

The three hypothetical situations that follow illustrate how contracting in a holistic health care relationship would differ from the current negligence analysis used with drugless healers. The practitioners in these hypotheticals—an iridologist and a Rolfer—work in fields that do not require licensing under state law. The first situation addresses the potential for harm in holistic health when the practitioner does not diagnose a pathological condition. The second focuses on breach of warranty and lack of informed consent when a client is disappointed with the results of treatment. The third analyzes the problems that occur when a client suffers physical harm.

##### A. *Potential for Harm Through Failure to Diagnose Pathological Condition*

###### 1. *The Facts*

Client consults Iridologist, complaining of listlessness and lack of appetite. Iridologist determines that Client is a heavy smoker, drinks moderately, and consumes an alarming amount of fried fast foods. Relying on the general color and texture of the iris and the dark spots within it to detect chemical imbalances, weakness in general body areas, and disturbed organ function,<sup>165</sup> Iridologist determines that Client's digestive system is not functioning properly.

Iridologist suggests that Client begin dietary changes with a cleansing diet of fruit juice. Thereafter, if he follows a low-fat, high-bulk vegetarian diet and exercises moderately every day, he should feel better. Iridologist also advises Client to quit smoking and to reduce his alcohol intake.<sup>166</sup>

Client stops smoking but cannot stay away from the Scotch. He tries the diet, takes up swimming, and improves his general eating habits although he continues to eat meat and makes periodic forays to McDonald's. He feels more energetic and continues his version of Iridologist's recommendations for about a year. At that point he consults his family physician for rectal bleeding,<sup>167</sup> and the physician diagnoses a small malignant tumor of the colon that requires surgery. The surgeon expresses his opinion that, had the malignancy been discovered earlier, surgical removal of part of Client's colon could have been avoided.

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make "clear agreements" with their clients that cover the nature of the services to be given, the responsibilities of each party, the duration of the agreement, and the mutual expectations of the parties. CALIFORNIA HEALTH PRACTITIONERS ASSOCIATION, PROVISIONAL ETHICAL STANDARDS § 5. In addition, practitioners must give prospective clients full information regarding their training, practice, and fees and must make clear that they are concerned with "the dynamics of vital energy as distinct from the diagnosis and treatment of pathology." *Id.* §§ 1-2.

165. See B. JENSEN, *THE SCIENCE AND PRACTICE OF IRIDOLOGY* 15-19 (1952).

166. These suggestions are typical in iridological consultations. *Id.* at 9-13.

167. Rectal bleeding is a symptom of cancer of the colon. Levin, *Gastrointestinal Bleeding*, in *CURRENT DIAGNOSIS* 43 (H. Conn & R. Conn eds. 6th ed. 1980).

## 2. Results of Tort Action

Client sues Iridologist for negligent failure to diagnose his cancer. The duty of care that Iridologist owes to Client arises from the consensual relationship into which they have entered.<sup>168</sup> To establish the appropriate standard of care in diagnosis, Client would have to call other iridologists as expert witnesses.<sup>169</sup> In a community standard jurisdiction these expert witnesses would have to be practitioners in the same community; in other jurisdictions they would have to follow a similar practice.<sup>170</sup> The court would determine who qualified as expert witnesses under these requirements, and the experts would then testify on whether a school of iridology exists. If it does, further testimony would be needed on the standard of practitioners from that school. Do these iridologists normally diagnose, and if so, for what kinds of conditions? Do they receive training that qualifies them to deal with problems like the plaintiff's? Since iridologists do not diagnose pathological conditions but merely assess a client's general state of health,<sup>171</sup> it is unlikely that the court would find a duty to diagnose in the school of iridology. Therefore, Client would have a weak case on duty to diagnose. But assuming *arguendo* that a duty is found, the questions would be submitted to the jury.<sup>172</sup>

The jury would decide whether the training and practice of Iridologist measured up to the standards of other iridologists of his school. If it found a breach of the standard, Client would have to prove that his alleged harm resulted from Iridologist's failure to diagnose.<sup>173</sup> Again, expert testimony would be required.<sup>174</sup>

Once duty, breach, harm, and causation were established, Iridologist might assert contributory negligence and assumption of risk as defenses. If he could show that Client failed to pursue routine medical checkups or delayed in consulting a physician when the rectal bleeding appeared, he could argue that Client was contributorily negligent.<sup>175</sup> If he could establish that Client knowingly and voluntarily consulted him only for his low energy and lack of appetite—that is, that Client knew what Iridologist's methods and limitations were and chose nonetheless to follow his recommendations—Iridologist would have a strong assumption of risk defense.<sup>176</sup>

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168. See *supra* note 104 and accompanying text.

169. See *supra* text accompanying notes 43–45.

170. See *supra* notes 33–34 and accompanying text.

171. B. JENSEN, *supra* note 165, at 13.

172. W. PROSSER, *supra* note 33, § 37.

173. *Id.* § 30.

174. See *infra* note 202.

175. See *supra* text accompanying note 69.

176. See *supra* text accompanying notes 60–68. Assumption of risk requires knowledge and appreciation of the risk and voluntary acceptance of it. RESTATEMENT (SECOND) OF TORTS §§ 496D, 496E (1976).

### 3. *Express or Implied Warranty*

In addition to the negligence claim, Client may also bring a breach of express warranty action. The primary issue would be whether Iridologist guaranteed a cure or diagnosis or whether he merely expressed his opinion that a better diet and regular exercise would increase Client's well-being.<sup>177</sup> As indicated earlier,<sup>178</sup> an implied warranty is not actionable.

### 4. *An Alternative Contractual Approach*

By altering the facts of the hypothetical, one can see the effects of a well-conceived contract. Client begins with an examination by his family physician, who finds nothing wrong. He then asks several friends about iridologists with whom they have worked, the improvements in their health, and their satisfaction with the results. Client checks with a practitioners' association for names and backgrounds of other iridologists.

Client then visits the iridologist of his choice and explains that he would like to increase his energy level. Iridologist explains that he cannot diagnose or cure specific diseases but that he can help the client identify ways to improve his general well-being. The two then discuss and form an agreement on the following matters:<sup>179</sup>

(a) *Purpose of agreement.* The parties agree that their mutual goal is to identify changes Client may make in his lifestyle to increase his energy and general well-being.

(b) *Responsibilities.* Iridologist agrees to use his training and experience, which he describes, to identify areas of Client's body that exhibit weakness or distress. He cannot diagnose specific diseases. He will recommend changes in habits that he believes will improve these conditions. Should conditions appear during the course of a normal iridological examination that require medical attention, he will advise Client to consult a medical practitioner.

Client will follow Iridologist's dietary advice for four months. He recognizes that these measures may not lead to rapid and dramatic "cure" and will require substantial effort.

(c) *Working relationship.* To encourage the success of the undertaking, the parties agree that they will meet at one-month intervals to assess progress and discuss difficulties. Should disagreements arise that they are unable to resolve, the parties agree to consult a named, mutually respected person to mediate and to abide by that person's decision.

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177. See *supra* text accompanying notes 73-82.

178. See *supra* text accompanying note 74.

179. This agreement is a general sketch and is not intended to serve as a model contract.



(d) *Term of relationship; fees.* The parties agree that the relationship will last for four months. At the end of that time they will assess progress and satisfaction and may continue the agreement for another period of two months. Either party may refuse to renew the agreement. Should Iridologist determine, on examining Client again, that the conditions are not responding to treatment, he will advise Client to consult a physician. Fees shall be set at \$x per visit, payable each time.

After an agreement has been reached, the scenario follows the facts in the situation above. Iridologist examines Client and recommends dietary changes, which Client follows in part. Client does not return at the specified intervals and undergoes surgery for colon cancer a year after the initial visit.

At this point, what are Client's rights under the contract? He cannot claim that Iridologist breached a contractual duty to diagnose because the contract did not include that duty. This result accords with the negligence analysis above, in which it was unlikely that a court would find a tort duty to diagnose.<sup>180</sup>

Under their agreement on responsibilities Client could claim breach of a contractual duty to refer only if he could establish that conditions which required medical attention became apparent and that Iridologist did not advise Client to consult a physician. Iridologist is neither required nor expected to diagnose pathological conditions; he must only report to Client readily perceived conditions that his treatment may not affect. Similarly, negligence law cannot logically create a duty to refer conditions that one is not required to diagnose.<sup>181</sup>

Thus, under the contract it will be unnecessary to establish by expert testimony a duty of care imposed on the practitioner by law and defined by the practice of other iridologists. The extent of the practitioner's duty is explicit in the contract. In addition, Client not only has rights against Iridologist, as under tort law, but also has explicit duties of his own. Unless he believes that he has a very strong case against Iridologist on breach of contractual duty, he will probably not sue at all since he did not fulfill his own express contractual duties. He neither followed Iridologist's recommendations nor returned for the agreed periodic assessments. This result resembles the strong contributory negligence defense available to the practitioner under tort analysis.

If Client believes he was unfairly persuaded to enter the agreement, he could claim undue influence or duress and, if successful, choose to avoid the contract, recovering the fees he has paid.<sup>182</sup> If he can meet the higher evidentiary requirements of a successful misrepresentation cause of action, he can

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180. See *supra* text accompanying note 171.

181. See *supra* text accompanying notes 50-59.

182. See *supra* text accompanying notes 139-42 & 145-46.

also recover for injury.<sup>183</sup> A negligence action remains available, of course, if he has sustained injury.<sup>184</sup> Client was fortunate to have had a choice of iridologists in this situation. Where practitioners are few, the protection against practitioner duress that is offered by competition will be weakened.<sup>185</sup>

In summary, if potential for harm exists through failure to diagnose a specific disease, an agreement between practitioner and client provides several advantages over a negligence approach. Should harm occur, a contract obviates the need for extensive expert testimony to establish the appropriate standard of care. If Client has been pressured into an unfair agreement, he is protected by tort law. Thus, when harm occurs a contract offers protections similar to those of tort law, yet simplifies the dispute.

When no harm occurs, a contract may still benefit the client. Changing the facts of this hypothetical, assume that Client suffered merely from poor general health and not from cancer. Although Client complained of fatigue, his family doctor found no evidence of disease. Presumably the physician therefore gave no corrective advice. If he did offer advice on diet, exercise, or smoking, he may not have impressed its importance on Client to the extent that an explicit contract would have done. Under his agreement with Iridologist, however, Client experienced results from the measures he took. Thus a contract can be an instrument for bringing about specific effects in a healing relationship.

## B. *Hypothetical B: Frustrated Expectations and Informed Consent*

### 1. *The Facts*

Client, a model, visits Rolfer on the advice of friends. She complains of chronic fatigue, tight muscles, and neck pain. Rolfer, who was trained in physiology and massage at the Rolf Institute and is certified by its Board,<sup>186</sup> describes the Rolfing procedure and the theory behind it.

She tells Client that the treatment consists of ten sessions of deep massage, which will at times include heavy pressure on Client's body and may elicit brief pain as restrictions in connective tissue are released in the process of returning the body to its natural alignment.<sup>187</sup> Accident, chronic bad posture, and physical expression of stress or emotional attitudes can cause the weight masses of head, chest, torso, and limbs to deviate from their natural positions.<sup>188</sup> As the body's connective tissue (*fascia*)<sup>189</sup> strains to support

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183. See *supra* text accompanying notes 143-44.

184. See *supra* text accompanying notes 143 & 147.

185. Epstein, *Contracting out of the Medical Malpractice Crisis*, 20 PERSPECTIVES IN BIOLOGY & MED. 228, 239 (1977).

186. ROLF INSTITUTE, 1980-81 CATALOG 3 (1980).

187. Rolf, *Structural Integration: A Contribution to the Understanding of Stress*, 5 BULL. STRUCTURAL INTEGRATION 5, 7 (1976).

188. *Id.*

189. Fascia: "[a] sheet of fibrous tissue which envelops the body beneath the skin, and also encloses the muscles and groups of muscles, and separates their several layers or groups." STEDMAN'S MEDICAL DICTIONARY 508 (23d ed. 1976).

these distortions, it thickens, fixing the alterations.<sup>190</sup> The Rolfer then returns the soft tissue to its "normal (anatomically efficient) position" through manipulation.<sup>191</sup> Greater freedom of motion results,<sup>192</sup> accompanied by an increase in energy since energy is no longer wasted on simply holding the body parts in position.<sup>193</sup> The series of manipulations may be followed by lessons in movement to maintain and enhance the effects of the Rolfing.<sup>194</sup>

Client relates her medical and physical history, including at Rolfer's request those traumas, surgeries, and accidents that she recalls. She describes her eating and exercise habits, as well as the stress she experiences at work. They begin the series of sessions. Although these recommendations are not part of standard treatment, Rolfer suggests that during the course of the Rolfing Client eliminate caffeine from her diet and undertake moderate daily exercise to counteract the effects of work-related stress.

After the final session Client is dissatisfied with the results. She still experiences some tension in shoulders and neck and also has become an inch taller following the release of constricted muscles and connective tissue. The clothes she was engaged to model for a fashion magazine no longer fit properly, and she loses the job. Client sues Rolfer for breach of express warranty of results and for lack of informed consent regarding the risks and effects of treatment.

## 2. Breach of Warranty

The analysis here is similar to that in Hypothetical A. The court will have to determine exactly what was said and what was promised, and whether Rolfer's statements were express promises or merely descriptions or reassurances.<sup>195</sup> In this hypothetical it does not appear that Rolfer gave any express warranty of results.

## 3. Lack of Informed Consent

Two issues must be resolved: (1) the scope of the required disclosure, and (2) whether the failure to make a required disclosure led to Client's alleged harm.<sup>196</sup>

Regarding the scope of disclosure, Client would argue that she was not adequately informed about the Rolfing procedure because Rolfer did not disclose the possible increase in height. A court that follows the traditional rule would require expert testimony by other Rolfers on whether they inform their clients of this possibility.<sup>197</sup> The standard would thus be set by other prac-

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190. Rolf, *Structural Integration: A Contribution to the Understanding of Stress*, 5 BULL. STRUCTURAL INTEGRATION 5, 7 (1976).

191. *Id.* at 5.

192. *Id.* at 7.

193. *Id.* at 9.

194. ROLF INSTITUTE, STANDARDS OF PRACTICE 3 (1981).

195. See *supra* text accompanying notes 73-79.

196. See *supra* text accompanying notes 111-12 & 126-27.

197. See *supra* text accompanying note 111.

titioners (who might not see height increases as a risk) and not by the needs of this client, who, because of her profession, might require additional information on potential body changes. In a materiality-rule jurisdiction this client's unique need for additional information would be better protected because the standard of disclosure would rest on what a reasonable person in her position would require to make an intelligent, informed decision.<sup>198</sup>

Rolfer could argue that she need not provide all information to Client since some of the "basic postulates" of informed consent do not apply in her field of practice. First, information on Rolfig and Rolfig practitioners is readily available, and the process is not difficult to understand. Therefore, Client does not suffer an abject dependence<sup>200</sup> on the practitioner for information. Second, the common knowledge exception<sup>201</sup> to the duty to inform may apply. Third, Client alone knew that a change in height would affect her adversely and did not advise Rolfer of this fact.

Whether she sued in a traditional or materiality-rule jurisdiction, Client would have to furnish expert testimony on risks of treatment and on causality.<sup>202</sup> Applying the subjective test of causality, the jury in a traditional jurisdiction would then decide whether Client would have declined Rolfig if she had known of the possible height increase. In a materiality-rule jurisdiction the jury would apply an objective test. In both jurisdictions the jury would also determine whether the common knowledge exception applied.<sup>203</sup> Client's case would suffer if limited numbers of Rolfers were available to testify, or if they were unwilling to testify against one of their colleagues.

In a traditional-rule jurisdiction Rolfer would most likely prevail if other Rolfers do not normally discuss potential height increases with clients. In contrast, under the materiality rule the jury could easily find for Client if it believed that a model would forego Rolfig if she thought it would result in professionally detrimental physical changes.

#### 4. *An Alternative Contractual Approach*

Altering the situation to incorporate the initial interaction between Rolfer and Client into a written agreement, the parties would consent in writing to the following:

(a) *Purpose of agreement.* The parties agree to work together to reduce stress and tension in Client's body and to strive for increased energy. The Rolfig method is described and discussed.

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198. See *supra* text accompanying notes 115-25.

199. See *supra* note 121 and accompanying text.

200. *Cobbs v. Grant*, 8 Cal. 3d 229, 242, 502 P.2d 1, 9, 104 Cal. Rptr. 505, 513 (1972).

201. See *supra* note 125 and accompanying text.

202. Although the materiality test eliminates the need for expert testimony on the standard of disclosure in the professional community, expert testimony is still required on other issues to establish: (1) the existence of risks in the medical procedure, (2) the existence of other modes of treatment, (3) that plaintiff's injury was caused by an undisclosed risk, and (4) the existence of any physician's privilege of nondisclosure (such as emergency or therapeutic silence). J. LUDLAM, *supra* note 111, at 33. See also *Canterbury v. Spence*, 464 F.2d 772, 792 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

203. J. LUDLAM, *supra* note 111, at 37 n.94.

(b) *Responsibilities.* Rolfer agrees to use her training and experience, which she describes, in bringing Client's body closer to its natural alignment. She will stop massage immediately when Client requests. She suggests actions Client may take to enhance the effects of Rolfing.

Client promises to appear at specified times for the ten sessions. Client understands that treatment may include heavy pressure and occasional brief pain. She agrees to reduce caffeine intake and to exercise daily to counteract stress buildup.<sup>204</sup>

a. *Guarantee of Results*

The contract is in writing and its terms are explicit. It does not contain language that promises a specific outcome: the parties have agreed only to work together and to strive for results. Client's body will be brought closer to its natural alignment, but the contract does not guarantee restoration of a perfect, natural position. Caffeine reduction is to counteract the effects of stress and enhance the effects of Rolfing, but Rolfer has not promised that all traces of tension will disappear. For greater clarity, Rolfer would have been wise to include a statement indicating that complete elimination of muscle tension and attainment of a high level of energy are not guaranteed.

b. *Unexpected Result: Increase in Height*

The agreement does not mention the possibility of an increase in height. The language "bringing the body closer to its natural alignment" could imply such an increase, but this interpretation would require a reasonably thorough knowledge of Rolfing, which the Client would not be expected to have. The question becomes, what did Client know about Rolfing, and would she have refused to enter this agreement had it mentioned possible height increases? In words resembling the language of informed consent, did Rolfer fail to divulge knowledge about Rolfing that, if known, would have materially influenced Client's decision?<sup>205</sup>

Incorporating detailed information about a holistic process into a written agreement may discourage parties from drawing up simple, workable arrangements. In situations like this hypothetical it may be more satisfactory to delegate a thorough discussion of procedure and outcome to the oral stage of agreement and to include in the written version a statement of all questions and concerns raised by the client after an oral description of the particular holistic process and of the practitioner's responses. The practitioner, however, must provide sufficient information for the client to understand what will happen during treatment and to frame relevant questions. Guidelines for

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204. A complete contract would be more extensive and would include terms such as those in Hypothetical A. These terms are isolated in order to analyze the problems of warranty and informed consent.

205. Regarding the possibility of duress, coercion, and fraud in contract formation, refer to text accompanying notes 134–47 *supra*.

this information might be provided by a practitioners' professional organization.<sup>206</sup>

Thus, it becomes Client's responsibility to bring unique needs to the attention of Rolfer, who does not know from previous training and experience that a client may consider increased height detrimental. This result differs from the traditional tort duty to disclose, under which a practitioner must follow the standards of customary practice and need not ascertain the requirements of individual clients.<sup>207</sup> If Client herself must make clear that a change in height would be material to her decision, her unique needs are protected to an even greater extent than under the materiality rule (provided that she assumes this responsibility) because the standard will be what she herself needs to know and not what a reasonable person in her position would require.<sup>208</sup> Client may even require information that jurors would consider unreasonable.<sup>209</sup> If she does not assume her responsibility, Rolfer will not be penalized for failing to guess her needs. In addition, Rolfer gains some professional freedom under the contract: she recommended eliminating caffeine and engaging in daily exercise, suggestions that are not standard Rolfig procedure. In other words, a contract allows the parties to bargain for terms that tort law would not require.

### *C. Hypothetical C: Physical Harm Occurs*

#### *1. The Facts*

Varying the situation in Hypothetical B, assume that Client failed to relate a childhood back injury to Rolfer. Between the fourth and fifth sessions Client slipped and fell, but she did not notice any back pain until after the sixth session. At that point she consulted a chiropractor, who readjusted her spine during several visits and at some expense.

#### *2. Tort Action and Results*

Client, who believes that Rolfig exacerbated the old and new injuries, sues Rolfer for negligence, claiming damages for chiropractic bills and for pain and suffering.

The problems in a negligence cause of action are similar to those outlined in Hypothetical A. Client will have to establish Rolfer's duty of care<sup>210</sup>

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206. The Rolf Institute, which trains and certifies all Rolfers, has established a Code of Ethics for practitioners and also oversees practitioner competence and client complaints. ROLF INSTITUTE, CODE OF ETHICS (1980); ROLF INSTITUTE, 1980-81 CATALOG 3 (1980). The California Health Practitioners Association has published a provisional code of ethics. CALIFORNIA HEALTH PRACTITIONERS ASSOCIATION, PROVISIONAL ETHICAL STANDARDS. Similar codes could include disclosure guidelines.

207. See *supra* text accompanying note 111.

208. See *supra* text accompanying note 128.

209. The objective test of causation in informed consent "is inconsistent with the patient's right of self-determination" because it "[denies] his right to act in what society would consider an unreasonable manner." J. LUDLAM, *supra* note 111, at 35-36.

210. See *supra* text accompanying notes 33-45.

through expert testimony and will have to show a breach of this duty.<sup>211</sup> She must prove harm and establish a causal connection between the alleged breach and her injury.<sup>212</sup> Determining the issue of proximate cause will require extensive expert testimony. Was the Rolfer a substantial factor in producing Client's harm?<sup>213</sup> Was the fall an intervening force,<sup>214</sup> and if so, was it a superseding cause,<sup>215</sup> which cuts off Rolfer's liability?

Causality in this situation is anything but clear. But if the trier of fact finds that Rolfer's negligence was a substantial factor in Client's injury and that the fall was not a superseding cause, Rolfer may choose to bring a contributory negligence defense. Client failed to relate not only the childhood injury, knowledge of which would have changed Rolfer's approach to her back, but also the fall itself. Thus, Client should bear at least some of the responsibility for subsequent pain and expense.

### 3. An Alternative Contractual Approach

The agreement above provides no special protections because the parties did not foresee Client's fall. If a legitimate cause of action exists in negligence,

211. W. PROSSER, *supra* note 33, § 30.

212. *Id.*

213. RESTATEMENT (SECOND) OF TORTS §§ 431, 433 (1965). Section 431 provides that:

The actor's negligent conduct is a legal cause of harm to another if

(a) his conduct is a substantial factor in bringing about the harm, and

(b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

Section 433 lists considerations that are important in determining whether an act is a substantial factor in causing harm:

The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:

(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

(b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;

(c) lapse of time.

214. *Id.* § 441. This section defines intervening force: "An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed."

215. *Id.* §§ 440, 442, 443. Section 440 defines superseding cause: "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." Section 442 presents criteria for determining whether an intervening force is a superseding cause:

(a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;

(b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;

(c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

(d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;

(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Section 443 limits superseding causes to forces that are not normal consequences of the actor's conduct: "The

this contract will neither bar that action<sup>216</sup> nor provide any particular advantages over it in court. But, because it warns Client in writing that Rolfer will apply heavy pressure and that she should expect some pain, it may impress on Client the importance of disclosing all injuries.

Such cautionary terms in a contract may actively prevent harm. For example, if the following provision is included in the original agreement Client will know that in Rolfiging all prior injuries are serious and that it is in her best interest to give comprehensive information:

Client will provide Rolfer with a complete history of injuries, surgery, and trauma. Rolfer promises to approach those sites with caution or not at all, according to her training and experience. At the beginning of each session Client will report any injuries or physical symptoms that have occurred since the last one.

With this agreement Client will be likely to report the fall. Rolfer will then be able to refer her to a physician before continuing the sessions, avoiding possible exacerbation of the injury.

## V. CONCLUSION

The amended agreements in these hypotheticals show that a carefully drawn contract can provide to both parties advantages that tort law lacks. It can make implied terms explicit and guard against misunderstandings over both the expected results of, and the differences between, holistic care and medical treatment. It can clarify the duties and responsibilities of each party, including the responsibility to furnish information. A contract allows the parties to bargain for terms that tort law would not automatically provide, permitting practitioners to use nonstandard techniques and allowing clients to protect their unique needs. A contract that does not contemplate unforeseen harm provides no special advantages other than its cautionary effect, but a tort action would still be available to determine the duties and liabilities of the parties under tort law. In addition, as the third hypothetical indicates, a contract may avert unexpected harm caused by misunderstanding or carelessness.

Negligence law already employs some of the principles on which a contract between holistic practitioners and their clients would be based. The defense of assumption of risk recognizes a client's right to choose a practitioner and to accept that practitioner's methods. Contributory negligence acknowledges that clients have substantial responsibility for their own care. The tort duty to refer ensures that when a practitioner's methods apply only to nonpathological conditions a client with symptoms of disease will receive care from a physician. Finally, the doctrine of informed consent permits

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intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about."

216. W. PROSSER, *supra* note 33, § 92.



clients to make decisions affecting their physical health and enhances the role of informed, intelligent participation by clients in the healing process.

However, negligence law recognizes neither the uniqueness of each practitioner-client relationship nor the skills and needs of individual parties because it defines the relationship in terms of judicially imposed norms: customary practice for the practitioner, and a reasonable person's judgment for the client. These norms stifle holistic care, a field in which practices are developing rapidly and lack the standardization of traditional medical techniques. Tort norms also contradict the notion of individual responsibility, one of the elements that is crucial to the effectiveness of holistic health care.

Ultimately, however, the efficacy of holistic practice is not the issue. Because many members of the public seek holistic care, the law governing holistic practice must ensure that a meaningful choice of practices and practitioners exists. Contractual agreements between practitioners and clients hold more promise of reaching this goal than does current tort law.

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